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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re L.L., a Person Coming Under the
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

A.G.,

Defendant and Appellant.

D075470

(Super. Ct. No. NJ15388)

APPEAL from an order of the Superior Court of San Diego County, Michael J. Imhoff, Commissioner. Affirmed.

Marisa L. D. Conroy, under appointment by the Court of Appeal, for Defendant and Appellant.

Thomas E. Montgomery, County Counsel, Caitlin E. Rae, Chief Deputy County Counsel, and Lisa M. Maldonado, Deputy County Counsel, for Plaintiff and Respondent.

A.G. (Mother) appeals an order denying her Welfare and Institutions Code section 388¹ petition to modify a prior order of the juvenile court in section 300 juvenile dependency proceedings regarding her son, L.L. The court's prior order terminated Mother's reunification services and set a section 366.26 hearing to select and implement a permanent plan for L.L. Her section 388 petition requested a modified order placing L.L. with her with family maintenance services or, alternatively, reinstating her reunification services. On appeal, Mother contends that she made a prima facie showing under section 388 and therefore the court abused its discretion by summarily denying her petition without a full evidentiary hearing. We affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

In October 2017, Mother, then 18 years old, gave birth to L.L. prematurely. On her admission to the hospital before his birth, Mother tested positive for marijuana and amphetamines. Mother stated she had used marijuana since she was 12 or 13 years old. She admitted using marijuana and methamphetamine on a daily basis during her pregnancy. When Mother previously was a dependent of the juvenile court, she admitted using methamphetamine, coke, mushrooms, acid, ecstasy, Percocet, Valium, hydrocodone, alcohol, and marijuana. A.L., L.L.'s presumed father (Father), reported that Mother used methamphetamine twice a day.

After his birth, L.L. tested positive for THC, had feeding and breathing problems, and was in the neonatal intensive care unit until February 2018. On his discharge from

¹ All statutory references are to the Welfare and Institutions Code.

the hospital on February 12, L.L. lived with Mother at his maternal grandmother's home. The San Diego County Health and Human Services Agency (Agency) offered voluntary services, but the family did not show up for a scheduled meeting two days later. Mother and Father did not meet with a substance abuse specialist as requested and drug tested only once. Contrary to Agency's requests, Mother did not attend Narcotics Anonymous (NA) meetings or seek individual counseling.

On February 22, 2018, Agency filed a section 300, subdivision (b) dependency petition alleging that L.L. had suffered, or there was a substantial risk that he would suffer, serious physical harm or illness as a result of the failure or inability of his parents to supervise or protect him adequately. The petition alleged that Mother and Father had long histories of drug use and had not complied with voluntary services offered to them.

At L.L.'s detention hearing, the juvenile court considered Agency's report, which stated that Mother and Father reported they had used methamphetamine for the past three years. Agency reported that neither parent had independent means to care for L.L. Agency stated its concern that Mother would continue to use methamphetamine while caring for L.L., thereby exposing him to drugs, causing his needs not to be met, and placing him in physical, emotional, and/or developmental danger. The court found that Agency had made a prima facie showing that L.L. was a person described by section 300, subdivision (b), and had presented facts showing his initial removal was necessary. The court ordered that L.L. be detained in out-of-home foster care with supervised visitation between L.L. and his parents. It also ordered that Agency provide reunification services to his parents.

In its jurisdiction and disposition report, Agency stated that Mother reported she had begun using methamphetamine when she was 15 years old. Agency provided her with referrals for parenting education and support, and for a substance abuse treatment program. Agency informed Mother that it was offering her reunification services and told her that because L.L. was under three years old, she would have six months to regularly participate and show substantive progress in those services and, if she failed to do so, her parental rights could be terminated and a permanent plan could be selected for L.L, such as adoption, guardianship, or long-term foster care.

At the March jurisdiction and disposition hearing, the court considered Agency's report, made a true finding on the dependency petition, removed L.L. from his parents' custody, declared him to be a dependent of the court, and ordered reunification services for his parents. In particular, the court found that the extent of progress made by Mother toward alleviating or mitigating the causes requiring L.L.'s placement had been "minimal."

In April, the dependency drug court found that Mother was not in treatment and was not compliant with its conditions and therefore terminated her from dependency drug court. In an addendum report, Agency reported that the Family Recovery Center (FRC) stated Mother had entered its residential drug treatment program in April, but left the following morning. FRC did not know what prompted Mother to leave its program. Agency reported that it did not know the whereabouts of Mother and Father at that time and that they had been uncommunicative and uncooperative.

In its six-month status review report, Agency stated that Mother had been arrested in May for receiving or concealing stolen property and arrested again in August for knowingly receiving a stolen vehicle and possessing drug paraphernalia (i.e., a methamphetamine pipe). Agency also stated that Mother was not participating in substance abuse treatment or any other reunification services. Mother had not visited L.L. since April, inquired about his care, or showed any intent to reunify with him. Father was incarcerated and would not be released until January 2019. L.L. was thriving in his foster home. Agency recommended that reunification services for Mother and Father be terminated and that a section 366.36 hearing be set.

At the November contested six-month review hearing, the court considered Agency's status review report, found that there was not a substantial probability that L.L. would be returned to his parents' physical custody within an extended period of time, terminated reunification services for his parents, and set a section 366.26 hearing to select and implement a permanent plan for L.L. The court further found that the extent of Mother's progress toward alleviating or mitigating the causes requiring L.L.'s foster placement was "none."

In late January 2019, Mother filed a section 388 petition to modify the court's November 2018 order by either placing L.L. with her and giving her family maintenance services or, if L.L. was not placed with her, reinstating her reunification services.²

² Father also filed a section 388 petition, which the court denied, and then he filed a notice of appeal challenging that denial. On May 29, 2019, we granted his request for

Mother asserted that after the November 2018 order was issued, she entered FRC's residential drug rehabilitation program, had made great progress in that program, and was prepared to have L.L. returned to her care in a safe environment at FRC. She asserted that she had tested negative for drugs and was attending NA meetings, drug rehabilitation programs, and parenting classes. She also had been consistently visiting and calling L.L. Mother argued that because she had reengaged in services on her own and her visits with L.L. were positive, it would be in L.L.'s best interests to be returned to her care or to reinstate her reunification services.

Mother's attachments to the petition included drug test chain-of-custody slips, NA meeting attendance sheets, an FRC parenting class attendance sheet, FRC good conduct commendation slips, a letter from Relapse and Recovery Sober Living, Inc. (R&R) confirming Mother's residency there in good standing, a McAlister Institute outpatient drug treatment schedule, and a dependency drug court email stating that Mother had entered its program in early January 2019, was in good standing and doing well in the program, and had attained 40 days of sobriety.

In February, Agency filed its section 366.26 report. Agency stated that L.L. was very sociable and generally adoptable. It recommended that a permanent plan of adoption be selected for L.L. Although his current foster parents were not open to adopting him, they were willing to care for him until a permanent placement was determined. Agency opposed Mother's section 388 petition.

voluntary dismissal and dismissed his appeal. Therefore, we do not discuss Father's section 388 petition.

Agency stated that Mother had been arrested in early December 2018 for possession of controlled substances and possession of a stolen vehicle. Mother was released from jail a few days later and entered the FRC residential drug treatment program. Agency stated that Mother left the FRC facility in late January 2019 without completing its treatment program. An FRC counselor reported that Mother had not met the program's requirements, despite its many intervention attempts. Mother informed Agency that she was in R&R's sober living facility and participating in programs at the McAlister Institute.

Agency acknowledged that since January 2019, Mother had demonstrated determination to seek substance abuse treatment and visit L.L. so that she can have him back in her life and Mother had consistently visited him about once per week. However, Agency did not believe that a change of circumstances had occurred because of the short period of time during which she was in drug treatment and her inability to complete a program. Agency recognized that Mother was very affectionate with and showed love for L.L. during her visits with him, but maintained that Mother had no parent-child relationship with him. According to Agency, Mother still had a long path to go toward maintaining a drug-free lifestyle in order to provide him with a safe environment and meet his needs.

L.L.'s court-appointed special advocate (CASA) filed a report in February, agreeing with Agency's recommendation that the parental rights of Mother and Father to L.L. be terminated and that a permanent plan of adoption be selected for him.

At the February 2019 hearing, the court first addressed Mother's section 388 petition. The court stated it had reviewed and considered Mother's petition, Agency's report, and the CASA's report. Mother argued that she had made a prima facie showing of changed circumstances and that her requested order would be in L.L.'s best interests and, based thereon, asked the court to grant her an evidentiary hearing on her petition. The court recognized that Mother then had 40 days of sobriety, but had just recently changed treatment programs, and it also observed that FRC had difficulty with Mother. The court stated that Mother had "not yet stabilized her recovery," noting she appeared to be in another program for only about two weeks. The court further noted that Mother had not been consistent with her visitation with L.L. until the beginning of 2019. Nevertheless, those visits had been enjoyable and appropriate by both Mother and L.L.

The court found that Mother had not carried her burden to show there had been a change of circumstances sufficient to justify a change in placement (i.e., return of L.L. to Mother's care) or that such change in placement would be in L.L.'s best interests. The court noted Mother had made recent positive steps in reinitiating contact and reestablishing a relationship with L.L., but stated "[f]ar more progress would need to be made until it's in his best interest to return" to Mother's care. Regarding Mother's request to resume reunification services, the court likewise found that Mother had not shown a sufficient change in circumstances that would compel it to vacate the permanency process and reinstate reunification services for her, nor had Mother shown the reinstatement of the reunification process would be in L.L.'s best interests. Although L.L. was not then in a concurrent placement, the court noted that L.L. is a very young child and active efforts

were being undertaken to locate an adoptive home for him. The court found that "given [L.L.'s] age, the time he has been outside the care of his parents, and importantly, the length of time in which he has not been able to establish a nurturing relationship with either parent, that it would not be in his best interest to grant the request to have additional reunification efforts." Accordingly, the court denied Mother's section 388 petition without an evidentiary hearing and, in so doing, impliedly found that Mother had not made a prima facie showing under section 388.³ Mother timely filed a notice of appeal challenging the court's order.

DISCUSSION

I

Juvenile Dependency Law and Section 388 Petitions

A

Reunification and permanency phases under juvenile dependency law. "The purpose of the California dependency system is to protect children from harm and to preserve families when safe for the child. [Citations.] The focus during the reunification period is to preserve the family whenever possible. [Citation.] Until services are terminated, family reunification is the goal and the parent is entitled to every presumption in favor of returning the child to parental custody. [Citations.] After reunification

³ Neither party asserts the juvenile court was unaware of section 388's requirement for an evidentiary hearing on Mother's section 388 petition that she first make a prima facie showing of changed circumstances or new evidence and that her requested order would be in L.L.'s best interests. Accordingly, we presume the court was aware of that requirement.

services are terminated, the focus is to provide the child with a safe, permanent home." (*Tracy J. v. Superior Court* (2012) 202 Cal.App.4th 1415, 1423.)

B

Section 388. Section 388 allows a parent or other interested person to petition the juvenile court to change, modify, or set aside a previously made dependency order. (§ 388, subd. (a)(1).) The petitioner has the burden of proof to show that there are changed circumstances or new evidence and that the requested change would be in the child's best interests. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317 (*Stephanie M.*); *In re G.B.* (2014) 227 Cal.App.4th 1147, 1157; *In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.) A section 388 petition must be liberally construed in favor of its sufficiency. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 461 (*Angel B.*).

The petitioner "need only make a prima facie showing to trigger the right to proceed by way of a full hearing." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310 (*Marilyn H.*)). However, if the petitioner does not meet that threshold showing, the juvenile court in its discretion may deny a request for a section 388 hearing. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415.) "The prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition." (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806 (*Zachary G.*)). The petition's allegations must be specific regarding the evidence to be presented and must not be conclusory. (*In re Alayah J.* (2017) 9 Cal.App.5th 469, 478 (*Alayah J.*)). In deciding whether a prima facie showing has been made, the court may consider the entire factual and procedural history of the case. (*In re Mickel O.* (2011) 197 Cal.App.4th 586,

616.) A summary denial of a section 388 petition does not violate due process. (*Angel B.*, *supra*, 97 Cal.App.4th at p. 460.)

The decision whether to grant or deny a section 388 petition is within the discretion of the juvenile court. (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1228; *In re Y.M.* (2012) 207 Cal.App.4th 892, 920.) Likewise, a decision to summarily deny a section 388 petition without an evidentiary hearing is within the juvenile court's discretion. (*Angel B.*, *supra*, 97 Cal.App.4th at p. 460; *Zachary G.*, *supra*, 77 Cal.App.4th at p. 808.) On appeal, a reviewing court will not disturb a discretionary decision by the juvenile court unless it abuses its discretion by making an arbitrary, capricious, or patently absurd determination. (*Stephanie M.*, *supra*, 7 Cal.4th at p. 318; *In re Marcelo B.* (2012) 209 Cal.App.4th 635, 642.) The appellant has the burden on appeal to affirmatively show that the juvenile court abused its discretion. (*In re A.A.* (2012) 203 Cal.App.4th 597, 612.)

II

Order Summarily Denying Mother's Section 388 Petition

Mother contends the juvenile court abused its discretion by summarily denying her section 388 petition to modify its November 2018 order. In particular, she argues that she made a prima facie showing that required the court to hold a full evidentiary hearing on her petition because she presented evidence that she participated in a drug treatment program, had maintained 40 days of sobriety, had negative drug tests, regularly visited L.L., and was currently living in a sober living facility and attending an outpatient drug treatment program. She argues that evidence showed changed circumstances or new

evidence and that her requested modification of the November 2018 order was in L.L.'s best interests. As discussed above, Mother had the burden of proof below to show that there were changed circumstances or new evidence and that her requested modified order would be in L.L.'s best interests, and also had the burden to make a prima facie showing of those two requirements to trigger the right to a full evidentiary hearing on her petition. (*Stephanie M.*, *supra*, 7 Cal.4th at p. 317; *Marilyn H.*, *supra*, 5 Cal.4th at p. 310.)

A

Contrary to Mother's assertion, we conclude the court did not abuse its discretion by impliedly finding that she had not made a prima facie showing of changed circumstances or new evidence in support of her section 388 petition. Despite Agency's warning to Mother that her parental rights to L.L. could be terminated if she did not regularly participate in reunification services during his six-month reunification period, Mother thereafter did not participate in any drug treatment program or services or other reunification services during that period and did not visit L.L. at all during an eight-month period in 2018. In fact, Mother waited until after the court terminated her reunification services in November 2018 and set a section 366.26 permanency hearing for L.L. to enter a residential drug treatment program and begin consistently visiting him.

Based on Mother's recent and belated efforts to address her long-standing drug abuse problems and form a bond with L.L., the court reasonably found those efforts were too short-term and inadequate to constitute a change in circumstances or new evidence. In particular, the court stated that Mother had "not yet stabilized her recovery." By so finding, the court, in effect, found that Mother's recent efforts showed, at most, changing

circumstances and not changed circumstances. (Cf. *Alayah J.*, *supra*, 9 Cal.App.5th at p. 482 [evidence showed, at best, changing circumstances]; *In re Casey D.* (1999) 70 Cal.App.4th 38, 49 [same]; *Angel B.*, *supra*, 97 Cal.App.4th at pp. 461-463 [court did not abuse its discretion by summarily denying mother's section 388 petition because evidence did not show she was ready to care for her child despite completing residential drug treatment program and parenting classes and obtaining employment; her four-month period of sobriety was relatively brief in comparison to her 22-year history of substance abuse].) Alternatively stated, the court could reasonably find Mother had not presented evidence that would support a finding that she had successfully addressed and ameliorated the primary issue that led to L.L.'s removal from her custody (i.e., Mother's long history of abuse of methamphetamine and marijuana).

Because the evidence Mother submitted in support of her section 388 petition showed, at most, changing circumstances, we conclude the court did not abuse its discretion by finding that Mother had not made a prima facie showing of changed circumstances or new evidence that would require a full evidentiary hearing on her section 388 petition.

B

We further conclude the juvenile court did not abuse its discretion by impliedly finding Mother had not made a prima facie showing that her requested modification of the November 2018 order was in L.L.'s best interests. Based on Mother's inconsistent visitation, which included a prolonged eight-month period of no visitation, with L.L. since the filing of his dependency case, the court could reasonably find that her weekly

visitation with L.L. during the two-month period before the February 2019 hearing, along with her lack of any parental relationship with him, showed that it was not in L.L.'s best interests to be placed with Mother with family maintenance services or to reinstitute reunification proceedings. The court also could reasonably find that, based on Mother's long history of drug problems, her failure to complete a residential drug treatment program, and her failure to show that she can live independently drug-free, she was at the time of the section 388 hearing unable to properly care for L.L. and provide him with a safe environment. Accordingly, the juvenile court did not abuse its discretion by impliedly finding that Mother did not make a prima facie showing that her requested modification of the prior order would be in L.L.'s best interests and a full evidentiary hearing on her section 388 petition was therefore not required. (*Angel B.*, *supra*, 97 Cal.App.4th at p. 460 [decision to summarily deny § 388 petition without evidentiary hearing is within court's discretion]; *Zachary G.*, *supra*, 77 Cal.App.4th at p. 808 [same].)

Because the court reasonably found that Mother did not make a prima facie showing of changed circumstances or new evidence or that her requested order would be in L.L.'s best interests, we conclude the court did not abuse its discretion by summarily denying Mother's section 388 petition without a full evidentiary hearing. (*Stephanie M.*, *supra*, 7 Cal.4th at p. 318; *Angel B.*, *supra*, 97 Cal.App.4th at p. 460; *Zachary G.*, *supra*, 77 Cal.App.4th at p. 808.) To the extent Mother cites evidence or inferences therefrom that would have supported a contrary finding by the juvenile court, she misconstrues and/or misapplies the applicable standard of review.

C

In support of her assertion that the juvenile court abused its discretion by finding she had not made a prima facie showing that her proposed modified order would be in L.L.'s best interests, Mother cites *In re Kimberly F.* (1997) 56 Cal.App.4th 519 (*Kimberly F.*). In *Kimberly F.*, the court listed three nonexclusive factors that juvenile courts should consider in assessing a child's best interests: (1) the seriousness of the problem that led to dependency and the reason the problem had not been resolved by the time of the final review; (2) the strength of the relative bonds between the child to both the child's parent and the child's caretakers, and the length of time the child has been in the dependency system in relation to the parental bond; and (3) the degree to which the problem that led to the dependency may be easily removed or ameliorated, and the degree to which it actually has been. (*Id.* at pp. 530-532.) However, *Kimberly F.* has been criticized for its focus on a parent's interest as opposed to the child's best interests and its failure to account for the California Supreme Court's prior decision in *Stephanie M.*, *supra*, 7 Cal.4th 295. (See, e.g., *In re J.C.* (2014) 226 Cal.App.4th 503, 527.) In *Stephanie M.*, the court stated that stability and continuity are the primary considerations in determining a child's best interests in the context of placement. (*Stephanie M.*, at p. 317.)

Accordingly, after reunification services have been terminated and before a section 366.26 hearing, a parent's section 388 petition requesting a return of custody or grant of reunification services must show that the requested order will advance the child's need for permanency and stability. (*In re J.C.*, at pp. 526-527.) Based on our review of the record in this case and our discussion above, we conclude the juvenile court reasonably found

that Mother did not make a prima facie showing that her requested modified order would advance L.L.'s need for permanency and stability and therefore would be in his best interests.⁴

Mother also cites *In re Hashem H.* (1996) 45 Cal.App.4th 1791 and *In re Jeremy W.* (1992) 3 Cal.App.4th 1407 in support of her assertion that the juvenile court abused its discretion by summarily denying her section 388 petition. In *In re Hashem H.*, the parent presented evidence showing that she had overcome her emotional and mental problems through successful counseling over an 18-month period; and in *In re Jeremy W.*, the parent presented uncontradicted evidence showing she had an ability to provide her child with stable living accommodations. (*In re Hashem H.*, at pp. 1793, 1797-1800; *In re Jeremy W.*, at pp. 1415-1416.) Accordingly, both of those cases are factually inapposite to this case and do not persuade us to reach a contrary conclusion.

⁴ Even if the juvenile court had considered the three *Kimberly F.* factors, we doubt its consideration of those factors would have changed its decision to deny Mother's section 388 petition. As discussed above, the court considered the seriousness of Mother's drug problem and failure to ameliorate that problem by the time of the February 2019 hearing. The court also considered Mother's lack of a parental bond with L.L. Our review of the record does not reveal, and Mother does not cite, any evidence showing the court may have, or should have, reached a different conclusion had it considered the *Kimberly F.* factors.

DISPOSITION

The order is affirmed.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

GUERRERO, J.